72-964 FILE COPY

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-964

EDWARD R. DUMESTRE, JR., ET AL.
Petitioners

versus

THE TRAVELERS INSURANCE COMPANY;
THE TRAVELERS INDEMNITY COMPANY; and
MID-CONTINENT SUPPLY CO.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
Index of Authorities	II
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Reasons Relied on for Granting of the Writ	4
Argument	4
Conclusion	6
Certificate of Service	7
Appendix "A"	8
Appendix "B"	9

INDEX OF AUTHORITIES

Cases:	Page
Brotners, Inc. v. W. E. Grace Mfg. Co., 320 Fed. 2d 594	5
Diapulse Corp. v. Curtis Publishing Co., 394 Fed. 2d 442 (1967)	5
Smith v. Pollin, et al, 194 Fed. 2d 349 (1952)	5
Wilson Research Corp. v. Piolite Plastics Corp., 336 Fed. 2d 303 (1964)	4
Statutes:	
28 U.S.C. 1332	2
28 U.S.C. 1254 (1)	2

IN THE

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NO. 73-

EDWARD R. DUMESTRE, JR., ET AL,
Petitioners

Versus

THE TRAVELERS INSURANCE COMPANY;
THE TRAVELERS INDEMNITY COMPANY; and
MID-CONTINENT SUPPLY CO.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLES THE CHIEF JUSTICES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Edward R. Dumestre, Jr., and his wife, pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the decision of that Court rendered on December 4, 1972, denying, summarily, a motion to remand the above captioned litigation to the District Court for the Eastern District of Louisiana for the sole purpose of filing a motion for a new trial pursuant to Rule 60 (b).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, not yet reported, is printed in Appendix "A" hereof.

The motion to remand tc the District Court for the purpose of filing a motion for a new trial pursuant to Rule 60 (b), is reprinted in Appendix "B" hereof.

JURISDICTION

The original jurisdiction in the District Court was predicated upon the provisions of 28 U.S.C., 1332.

This Hnorable Court's jurisdiction is invoked under the provisions of 28 U.S.C., Section 1254 (1).

THE QUESTIONS PRESENTED

The above captioned litigation sounds in tort. The claim arises out of an intersectional collision between residents of Louisiana and a vehicle owned and operated by a corporation foreign to the State of Louisiana. Mr. and Mrs. Edward R. Dumestre were occupants of one of the vehicles and two separate were filed, but later consolidated for trial.

The consolidated cases were tried by jury and a jury verdict was rendered on April 13, 1972. This verdict was reduced to judgment on April 20, 1972, awarding $39,500.00 to Mr. Dumestre and $6,000.00 to Mrs. Dumestre.

A notice of appeal on behalf of the petitioners was filed on May 12, 1972, and that appeal was perfected.

On November 9, 1972, it was discovered by counsel for the petitioner, Mrs. Alva Dumestre, that surgery had been performed on her on September 26, 1972, by Dr. Randall Williams, an Orthopedic expert of the City of New Orleans.

In view of this newly discovered evidence which was not available at the time of the trial, the petitioner filed a motion to remand to the District Court for the purpose of filing a motion for a new trial due to the newly discovered evidence pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure. This motions was filed on November 10, 1972.

On December 4, 1972, an order was issued by the Fifth Circuit Court of Appeals, Justices Goldberg and Morgan with Chief Justice John R. Brown presiding, wherein the motion for remand for the sole purpose of filing a motion for new trial under Rule 60 (b) of the Federal Rules of Civil Procedure was denied.

The petitioners seek a review by this Court of the order of the Fifth Circuit Court of Appeals denying the above referred to motion for the reason that the right granted to the petitioners under Rule 60 (b) of the Federal Rules of Civil Procedure has no remedy or may not be exercised in view of the order of the Fifth Circuit Court of Appeals complained of.

REASONS RELIED ON FOR GRANTING OF THE WRIT

If petitioners are granted the right under the provisions of Rule 60 (b) of the Federal Rules of Civil Procedure, and if the Court of Appeal for the Fifth Circuit disallows the exercise of that right, then the Court of Appeals for the Fifth Circuit has in effect overruled the Supreme Court of the United States in its order creating these rules in establishing the rights of litigants and the procedures to be filed in prosecuting those rights.

ARGUMENT

Rule 60 (b) was created by order of the Supreme Court, dated December 29, 1948, and provides litigants with the right to file a motion for a new trial if they have discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b).

It is hornbook law that in civil cases of this type, the District Court is divested of jurisdiction once an appeal has been perfected.

The various circuits in the United States have adopted conflicting interpretations of Rule 60 (b) and the following indicate the treatment by various circuits selected at random:

The First Circuit requires a remand from the Court of Appeal to the District Court for the purpose of filing the motion in question as set forth in the case of Wilson Research Corp. v. Piolite Plastics Corp., 336 Fed. 2d 303 (1964). The Second Circuit, in some strained

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reasoning unsupported by the Rules, held that the District Court yet retains jurisdiction in the case of Diapulse Corp. v. Curtis Publishing Co., 374 Fed. 2d 442 (1967).

The Fifth Circuit adopted the Federal Rules of Criminal Procedures in the case of Smith v. Pollin, et al, 194 Fed. 2d 349 (1952). A fair reading of this case would indicate that this adoption and the incorporation of the Criminal Rules into the Civil Rules was done because of the lack of a guideline and because serious injustice would have occurred had it not been adopted.

This same Fifth Circuit in the case of Brothers, Inc. v. W. E. Grace Mfg. Co., 320 Fed. 2d 594, held that where a mandate had been issued by a Court of Appeals, permission to file under Rule 60 (b) must be obtained from the Court of Appeals and could not be filed in the District Court once the appeal had been perfected.

The petitioners are deeply aggrieved in that they are now without a remedy and are unable to file a motion for a new trial based on this newly discovered evidence which would certainly result in a different jury verdict. The Court of Appeals rendered no opinion in denying the motion, and the petitioners suggest that under Rule 1 of the Federal Rules of Civil Procedure, the Fifth Circuit Court of Appeals did not construe Rule 60 (b) so as to secure the just, speedy and inexpensive determination of this action.

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CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted, to the end that its judgment in denying the motion to remand to the District Court for the purpose of filing a motion for new trial pursuant to Rule 60 (b) will be reviewed, will be vacated and set aside and this cause will be remanded to the United States District Court for the Eastern District of Louisiana, with instructions to allow the parties litigant to file their motion in accordance with the Federal Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served two copies of the foregoing petition for a Writ of Certiorari upon Mr. Patrick W. Browne, Jr., attorney for all respondents and interested parties in the Court of Appeals, by mailing the same to him, postage prepaid, at 225 Baronne Street, New Orleans, Louisiana, this 25 day of December, 1972.

Anthony V. Lapritto

APPENDIX A

U.S. COURT OF APPEALS
FILED
Dec 4 '72
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-2313

EDWARD R. DUMESTRE, JR., ET AL.,

Plaintiffs-Appellants,

versus

THE TRAVELERS INSURANCE COMPANY,
THE TRAVELERS INDEMNITY COMPANY,
and MID-CONTINENT SUPPLY COMPANY,

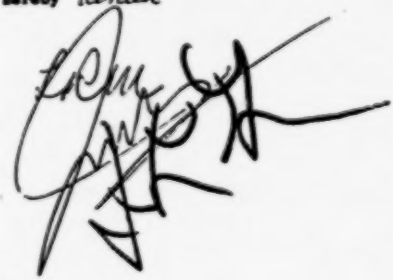
Defendants-Appellees.

Appeals from the United States District Court for the
Eastern District of Louisiana

Before JOHN R. BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion to remand this cause to the District Court for the Eastern District of Louisiana for the purpose of filing a motion for a new trial pursuant to Rule 60(b), filed in the above styled and numbered cause, is hereby denied



APPENDIX B

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 72-2313

EDWARD R. DUMESTRE, JR., ET AL,

Plaintiffs-Appellants

- VERSUS -

THE TRAVELERS INSURANCE COMPANY;
THE TRAVELERS INDEMNITY COMPANY; and
MID-CONTINENT SUPPLY CO.

MOTION TO REMAND TO THE DISTRICT COURT FOR THE PURPOSE OF FILING A MOTION FOR A NEW TRIAL PURSUANT TO RULE 60 B

ON THE MOTION OF Alva Savoie Dumestre, wife of and Edward R. Dumestre, Jr., through undersigned counsel, and on a showing to this Court that:

I.

The above captioned tort case (automobile rear end collision) was tried and decided before a jury on April 12th and 13th, 1972.

II.

Numerous physicians gave testimony with reference to the cause of Mrs. Dumestre's complaints in the cervical spine from the date of the accident until the date of the trial.

III.

The treating physician and orthopedic expert, Dr. Randall A. Williams, testified principally for Mrs. Dumestre. The thrust of his testimony and the thrust of the medical testimony of the defense was that all were unable to, with certainty, find objective findings in Mrs. Dumestre's neck, although she consistently complained of great pain and instability of her neck.

IV.

Understandably, the jury made a minimal award from which the plaintiffs have appealed.

V.

Counsel for the plaintiffs discovered, on November 9, 1972, that surgery had been performed on Mrs. Alva Dumestre's cervical spine on September 26, 1972.

VI.

A copy of the operative notes from Dr. Randall A. Williams is attached to this motion, and Dr. Williams is prepared to testify that the condition he found in the cervical spine of Mrs. Alva Dumestre requiring fusion was the direct result of the trauma she received in the accident made the basis of this suit.

VII.

The plaintiffs are desirous of filing a motion for a new trial because of this newly discovered evidence.

VIII.

Rule 60 B of the Rules of Civil Procedure provides for the filing of the motion for new trial in the District Court. However, because of the pending appeal, the District Court is without jurisdiction and, therefore, it is necessary to have the above captioned litigation remanded to the District Court for the purpose of filing and presenting the motion for a new trial if the plaintiffs' rights under Rule 60 B are to be exercised.

W H E R E F O R E, plaintiffs pray that the above captioned appeal of Mrs. Alva Savoie Dumestre be remanded to the District Court for the sole purpose of allowing Mrs. Dumestre to file a motion for new trial for newly discovered evidence pursuant to Rule 60 B.

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O R D E R

The above captioned appeal of Mrs. Alva Savoie Dumestre, wife of Edward R. Dumestre, is remanded to the District Court for the sole purpose of allowing her to file and argue a motion for new trial based upon newly discovered evidence.

New Orleans, Louisiana, this _____ day of _____, 1972.

J U D G E

ALVA DUMESTER

RANDALL WILLIAMS, M.D.

9-26-72

Instability, cervical spine

SAME

POSTERIOR CERVICAL FUSION WITH ILIAC BONE GRAFT, C4 TO C7

RANDALL WILLIAMS, M.D.

PROCEDURE IN DETAIL: Under adequate general endotracheal anesthesia with the patient in the prone position, the posterior aspect of the neck and the posterior ilium were prepped with pHisoHex and Betadine and draped in a sterile fashion. An incision was then made in the midline posteriorly of the neck and carried down through the skin and subcutaneous tissue to the ligamentum nuchae which was divided. Upon division of the ligamentum nuchae the spinous processes of the cervical vertebra 4, 5, 6 and 7 were identified, there was noted to be disruption of the interspinous ligament between these named vertebra with marked instability of the neck. The absence of the posterior ligaments would be indicative of previous injury. Following exposure of the spinous processes, the remaining portion of soft tissue which was present was stripped from the lamina bilaterally between the C4 and C7. Following this, using a sharp, bone-cutting forcep the spinous process at C4, 5 and 6 were removed and a notch cut into C7. Then, utilizing a Lukeall rongeur and an air drill, the cortical bone from the lamina between C4 to C7 was denuded down to bleeding cancellous bone. After this had been achieved, a second incision was made over the posterior ilium on the left and carried down through the skin and subcutaneous tissue to the deep fascia which was incised, all soft tissue was stripped from the posterior ilium. Then, adequate cortical and cancellous bone was taken from the posterior ilium and packed about the denuded area in the neck between C4 and C7. Following this, the two wounds were closed in layers: the deep fascia with interrupted #0 chromic and subcutaneous tissue with #3-0 plain catgut and the skin with a running #3-0 nylon suture. A sterile dressing was applied to both wounds and the patient was placed in a four-poster cervical brace.

The patient tolerated the procedure well and was returned to Recovery in good condition.

RD/dph
D: 10-25-72
T: 10-26-72

RANDALL WILLIAMS, M.D.